CASE NO. 08-0964

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

EDWARDS AQUIFER AUTHORITY and
STATE OF TEXAS,

Petitioners and Cross-Respondents,

v.

BURRELL DAY and JOEL McDANIEL,

Respondents and Cross-Petitioners.

On Petition for Review from the
Fourth Court of Appeals at San Antonio, Texas
Case No. 04-07-00103-CV

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS AND RESPONDENTS BURRELL DAY AND JOEL McDANIEL

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Miscellaneous

INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind in the United States. For more than 35 years, PLF has litigated in support of the right to use property free of intrusive government interference, and advocated in favor of a reasonable balance between environmental protection and other necessary functions of society.

On several occasions, PLF attorneys have appeared before the United States Supreme Court as counsel of record in landmark cases arising under the United States Constitution's Takings Clause, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys also have filed numerous amicus briefs in state and federal court, including in this Court. Finally, PLF attorneys have published many law review articles exploring the scope of constitutional protection for property rights, some of which have been cited by this Court. *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 66 n.19 (Tex. 2006) (citing J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State*

[1] Counsel certifies that no one paid any fees for the preparation of this amicus brief.

Courts under a Rule Intended To Ripen the Claims for Federal Review, 33 B.C. Envtl. Aff. L. Rev. 247 (2006)).

One of PLF's particular areas of concern is the impact of groundwater regulation on the right and ability of farmers and ranchers to withdraw enough water to make a living off the land. PLF has accordingly participated in many water rights cases, arguing that such rights are vital and protected individual rights. *See*, *e.g.*, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008); *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), *Hage v. United States*, 35 Fed. Cl. 147 (1996).

PLF believes its litigation experience and public policy perspective will assist the Court in considering whether and to what extent Texas groundwater is private property and to what extent the Texas Constitution guards against government regulation of that property.

INTRODUCTION

This case involves the State of Texas (State) and Edwards Aquifer Authority's (Authority) (together referred to as "the government") attempt to narrowly define private rights in Texas groundwater and to avoid constitutional liability when regulating away the right of property owners to withdraw water. The government's position is flawed, both in its belief that the term "property" in Article I, section 17, of the Texas Constitution does not cover groundwater until that water is physically withdrawn, and in its

secondary contention that the constitutional provision imposes minimal constraints on deprivations of groundwater.

The water owners (Water Owners) in this case and their amici have adequately outlined the precedent establishing that real property owners own a separate interest in the water under their land and have an unfettered common law right to capture and use it. Amicus PLF will not reargue the details of their position. Instead, Amicus PLF seeks to advise this Court of some general analytical principles relevant to the issue of whether the Constitution protects against takings of groundwater rights.

The first principal is that constitutional protection for common law rights does not depend on any "vesting" actions. Common law property rights are necessarily incorporated in constitutional property protections, and ownership of such interests triggers that protection.

Second, the existence of common law property interests and constitutional protection for those interests is not a function of the exercise of legislative power. While a statute can modify common law property rights as a general matter, this authority does not permit alterations of property rights free of constitutional restraints. The legislature has power to pass laws in derogation of common law rights only within the limits of the Constitution, including due process and just compensation. If the legislature defines away common law property rights, its act must bow to those constitutional limits.

Here, that the legislature can regulate groundwater does not immunize it from the claim that its scheme amounts to a taking.

Finally, Article I, section 17, of the Texas Constitution offers robust property protections in general and in the area of groundwater regulation. In many contexts, that guarantee binds the government to pay compensation or rescind its actions due to the burden it imposes on private property, without respect for an owner's existing property values or "expectations." In particular, a physical invasion, de facto occupation of property, or regulatory denial of all use of property is a taking regardless of an owner's purchase expectations. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670-71 (Tex. 2004). Here, the government's act of putting off-limits some of the property owner's available groundwater amounts to a per se, physical taking. It matters not that the water denial restricted only a portion of the Water Owners' available water; "in the physical taking jurisprudence any impairment is sufficient." *Casitas Mun. Water Dist.*, 543 F.3d at 1292, *see also Dugan v. Rank*, 372 U.S. 609, 623 (1963) ("[I]f any part of respondents' claimed water rights were invaded it amounted to an interference therewith and a taking thereof."). Since the circumstances easily state a claim for an unconstitutional taking of the Water Owners' water, the takings claim should be remanded.

I

THE CONSTITUTION PROTECTS COMMON LAW PRIVATE PROPERTY RIGHTS—LIKE OWNERSHIP OF GROUNDWATER—WITHOUT "VESTING" CONCERNS, AND THE LEGISLATIVE POWER TO REGULATE DOES NOT DILUTE THIS PROTECTION

The government contends that common law property interests do not merit constitutional protection, including from uncompensated appropriation, until they become "vested." Authority's Petitioner's Brief on the Merits at 7, 19-29, 35-38. They further imply that the legislative power to regulate common law property interests inhibits constitutional protection for those interests. *Id.* at 31-34.

Both points are wrong. The "vested rights" argument improperly injects an approach limited to property interests *created by positive law* into analysis of common law property interests. But common law property rights are protected without respect to modern vested rights limitations on state-created rights. And while the State may certainly regulate common law property rights, it cannot erase those rights without violating constitutional protections.

A. The Origin and Limited Scope of Modern Vested Rights Concepts

The idea of "vested" property rights is not a new concept in general, but it is a novel (and improper) way to identify constitutionally protected common

law rights. The modern vested rights doctrine is typically associated with, and applied in, cases involving alleged property rights *emanating from statute or other positive enactments*. The doctrine requires a would-be property rights claimant to take some action or show some entitlement aside from a legislative grant to claim constitutional protection against loss of the right. *Sgro v. Howarth*, 203 N.E.2d 173, 177 (Ill. Ct. App. 1964) (acquisition of vested rights involves a property claimant: (1) relying in good faith, (2) upon some right—a promise, act or omission of the government—and (3) resulting in some substantial change or other commitment prior to the government altering or rescinding the right).

Texas' modern vested rights doctrine finds expression in the early decision of *City of Dallas v. Trammell*, 101 S.W.2d 1009 (Tex. 1937). *Trammell* dealt with a Texas law that sought to reduce police officers' pension payments, payments themselves created by statute. *Id.* at 1009-11. When the legislature reduced the payments, the Court held that the plaintiff could not raise a takings claim because he had no vested right to any level of payment. In so doing, the Court stated: "'A right to be within the protection of the Constitution, must be a vested right. It must be something more than a mere expectancy based upon an anticipated continuance of an existing law.'" *Id.* at 1014 (quoting *Dodge v. Bd. of Educ. of City of Chicago*, 5 N.E.2d 84, 86 (Ill. 1936).

The Authority claims that *Trammell* sets a universal rule for identifying protected property interests. Authority's Petitioner's Brief on the Merits at 8. But it does not. No common law property rights were at issue in *Trammell*, and nothing indicates the decision extends beyond the purported state-created "property right" in pensions. Like *Trammell* itself, the precedent cited in that decision deals with rights *created by statute*. 101 S.W.2d at 1013-15. *Trammell*'s vested rights doctrine begins and ends with statutorily created rights.

Subsequent Texas decisions confirm that the modern vested rights doctrine is associated with novel and/or state-created rights, and inapplicable to traditional, common law property rights. In *Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, 282 S.W.3d 59, 60, 62 (Tex. 2009), this Court applied vested rights concepts to a takings claim brought by a public utility told to relocate structures out of a public right-of-way. The Court noted that the utility's right to be in the public right of way derived directly from a statute alone. *Id.* at 62. The utility had to, but did not, have a vested right in the statutory entitlement to claim constitutional protection. *Id.* Thus, as in *Trammell*, the vested rights doctrine came into play in *Southwestern Bell* only because a positive law was the source of the alleged property right. Other cases are in accord. *See, e.g., Byers v. Patterson*, 219 S.W.3d 514, 524 (Tex. Ct. App.-Tyler 2007, rehearing overruled, review denied). In short, modern

vested rights doctrine—the doctrine invoked in this case by the government entities as the purported baseline for protected property—is not derived from or designed for common law property rights.

It is true that one can find the term "vested" in a few early opinions discussing more traditional property interests. *Texas Co. v. Daugherty*, 176 S.W. 717, 720 (Tex. 1915).[2] Yet, in such cases, the term is not used in the modern sense; *i.e.*, as requiring something beyond ownership to trigger constitutional protection. Instead, older usage of "vesting" simply describes the state of owning a common law property interest in its natural state, which state is *alone sufficient* to trigger constitutional protection. *Id.* ("[Their] vested interest in the minerals *in the ground*, forming in their natural state a part of the land, with absolute dominion over them while in that state, and with the further unlimited right to their appropriation, *plainly constitute property* and all that is recognized in proprietorship, and equally amount to an interest in the land itself.") (emphasis added).

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[2] In *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 630 (Tex. 1996), this Court used the term vested in connection with water rights but did not explain whether it was using the term in the modern sense or in the older sense that "vesting" refers to ownership. *Id.* ("Assuming without deciding that Plaintiffs possess a vested property right in the water beneath their land.").

B. Common Law Property Rights Are Per Se Constitutionally Protected Because They Antedate the Constitution

If modern vested rights concepts do not determine whether a common law interest is protected by the Constitution (and they do not), what principle does? The answer is simple and straightforward: the common law origin of a property right or interest itself triggers constitutional protection. This is because common law rules and principles, including property interests, typically antedate the Texas Constitution. They were consequently incorporated into the Constitution. *Great S. Life Ins. Co. v. City of Austin*, 243 S.W. 778, 780 (Tex. 1922); *Lynch v. Port of Houston Auth.*, 671 S.W.2d 954, 960 (Tex. Ct. App.-Houston [14th Dist.] 1984, writ refused, n.r.e.). As this Court long ago declared:

> The Constitution was framed with reference to the common law, and in judging what the Constitution means we should keep in mind that it is not the beginning of the law of the state, but that it assumes the existence of a well-understood system, which was still to remain in force and be demonstrated, and that the *constitutional definitions are in general drawn from the common law*.

Great S. Life, 243 S.W. at 780 (emphasis added).

In short, because common law property interests are incorporated into the "property" provisions of constitutional guarantees like Article I, section 17, those guarantees necessarily apply to, and protect, ownership of such interests. *Id*. Although the term "vested" should not be used—so as to avoid confusion

with the modern, positive property rights doctrine—one would be correct to say that a common law property right is "vested," and constitutionally protected, by ownership alone. *Texas Co.*, 176 S.W. at 720.

It is so basic that ownership of common law property warrants constitutional protection that most decisions do not even raise the issue. Texas courts have routinely applied constitutional protections to common law interests such as (1) the right to make economically beneficial use of land,[3] (2) the right to exclude others from real property,[4] (3) the right to access property,[5] (4) the right to extract minerals,[6] and here, (5) the right to capture groundwater.

This Court should follow the traditional and established understanding that common law property interests are per se constitutionally protected. Simultaneously, it should avoid any suggestion that these rights are subject to the modern, vested rights doctrine. Making constitutional protection for common law property rights contingent on vesting—in the sense of requiring some act or interest beyond ownership—would go far toward eviscerating that

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[3] *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978); *see also Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015-17 (1992).

[4] *GTE Sw. Inc. v. Pub. Util. Comm'n of Texas*, 10 S.W.3d 7, 11-12 (Tex. Ct. App.-Austin 1999, hearing granted in part).

[5] *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965).

[6] *Texas Co.*, 176 S.W. at 720.

protection. After all, modern vesting doctrine would allow the government to take any traditional property interest, without constitutional restraint, on the ground that interest was not yet sufficiently exercised.[7] The Court should ignore vested rights terminology in discussing constitutional protection for water rights.

C. The Legislative Power To Derogate from the Common Law Does Not Erase or Limit Constitutional Protection for Common Law Property Rights

There can be no doubt that the owner of real property has a common law right to capture and use groundwater without excessive waste. *Friendswood Dev. Co. v. Smith-Sw. Indus., Inc.*, 576 S.W.2d 21, 25-27 (Tex. 1978). The government stresses, however, that the Texas legislature has the power to modify and regulate groundwater rights and that it has done so. In so doing, it implies that such legislative regulation can strip groundwater rights of their constitutionally protected character. Authority's Petitioner's Brief on the Merits at 32, 34. This fails to appreciate that the legislative power to alter common law property rights is limited by constitutional boundaries.

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[7] Consider the result if the common law right to make economically beneficial use of property were to be infected with a modern vested rights rule. Under such a scheme, a property owner would likely have no protected property and no constitutional recourse if the government regulated his land into open space before he constructed anything that "vested" his right. Such a legal doctrine would invite the government to race to limit property rights before they are actively utilized so that it can defeat any constitutional claim with the vested rights doctrine. This is obviously untenable.

It cannot be doubted that the legislature may pass laws derogating from the common law. *Middleton v. Texas Power & Light Co.*, 185 S.W. 556, 560 (Tex. 1916); *Bartley v. Guillot*, 990 S.W.2d 481, 485 (Tex. Ct. App.-Houston [14th Dist.] 1999, pet. denied). However, this power does not operate without limit, because it is also true that the Constitution is superior to the legislature. *Jones v. Ross*, 173 S.W.2d 1022, 1024 (Tex. 1943) (With respect to constitutional provisions, "it does not lie within the power of the Legislature . . . to enact laws in conflict therewith."). Legislatively valid alterations of the common law must still conform to constitutional limits. *Houston Pipe Line Co. v. Beasley*, 49 S.W.2d 950, 952 (Tex. Ct. App. 1932) ("No one can doubt the authority of the Legislature to alter or repeal any rule of the common law affecting the property or social rights of the citizen, unless such repeal or alteration is obnoxious to the constitution of the state or of the United States."); *see also Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955) ("Legislative action of this type is not sustained when it is arbitrary or unreasonable.").

In the property context, the state legislature is not constitutionally free to pass laws that have the effect of defining away a common law property right. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998) ("[A]t least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing

traditional property interests long recognized under state law."). If legislative regulation of a common law property right substantially abridges the right, the legislature's authority does not insulate it from constitutional liability. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation."). The bottom line is that, while the nature and scope of legislative regulation may be relevant to the *merits* inquiry into whether a taking of property has occurred, the existence of regulation is irrelevant to the initial determination that a protected common law right exists.

Zoning cases offer one illustration of the foregoing principle. Zoning laws are in derogation of the common law right to freely use private property. *Thomas v. Zoning Bd. of Adjustment of City of University Park*, 241 S.W.2d 955, 957 (Tex. Ct. App. 1951). And yet this legislative power does not eviscerate the protected nature of the common law right. Rather, any such legislative derogation from the right to use private property must still conform to constitutional limitations. *City of West University Place v. Ellis*, 134 S.W.2d 1038, 1041 (Tex. Ct. App. 1940) ("[I]t is settled that when depreciation in value [by zoning] is such as to make the property practically worthless for the designated use, this constitutes confiscation."); *Hardy v. Calhoun*, 383 S.W.2d 652, 655 (Tex. Ct. App.-Texarkana 1964) ("'[Z]oning acts and ordinances passed under them are valid and constitutional as structural

or general legislation whenever they are necessary for the preservation of public health, safety, morals or general welfare, and not unjustly discriminatory, or arbitrary, or unreasonable, or confiscatory in their application to a particular or specific piece of property.'") (quoting *Appeal of Lord*, 81 A.2d 533 (Pa. 1951).

The same reasoning would apply to any common law property right, including the right to own, capture, and use groundwater. Again, while the legislature may regulate a water right, this regulation does not change its private character or its constitutionally protected nature. Here, passage of the Edwards Aquifer Act and associated regulations does not change the protected nature of the Water Owners' interest in all the water beneath their land, which they could reasonably capture and use. Therefore, the dispositive takings question in this case is not whether the denied water is "protected property." Rather, the essential question is on the merits; namely, whether denial of the Water Owners' ability to capture, possess, and use their groundwater is a taking.

II

THE GROUNDWATER DENIAL HERE IS A TAKING UNDER THE STRICT PHYSICAL TAKINGS TEST

In deciding whether the Water Owners state a claim for an unconstitutional takings, the nature of the applicable standard of review is

critically important. The State asserts that a regulatory takings analysis applies, and hinges primarily on the property owner's "expectations." State's Brief on the Merits at 10, 29. This is a common tactic of government defendants; *i.e.*, to portray takings liability as a function of a property owner's "expectations." This allows the government to argue that the prior regulation of the owner's property precludes any reasonable expectation of free enjoyment of the property. *Palazzolo*, 533 U.S. at 626. From the government's perspective, it is a neat little circularity that would work like this: Prior regulation of property means no reasonable expectations of free use can form, lack of expectations means there is no viable takings claim, which reduces to the proposition that property rights can be constitutionally denied simply by the exercise of regulatory authority. *Id.*; *see also* Steven J. Eagle, *Regulatory Takings*, Ch. 7 § 7-13(b), at 1044 (4th ed. 2009) ("the inherent circularity between [property] rights shaped by understandings of government conduct and government conduct being judged with respect to rights easily can become a spiral leading to the diminution of rights").

The government's position here is mistaken on three levels. First, and generally, takings law is not a matter of a property owner's expectations; it is a matter of the burden imposed on property by the challenged action. Second, and more importantly, the government is wrong in contending that this case is analyzed as a regulatory takings case. Because the water denial here prohibits

capture, possession, beneficial use, and sale, it has the character of a physical occupation and must be considered a physical taking. As such, the water denial violates the Constitution, regardless of anyone's "expectations."

A. Takings Liability Is Dependent on the Regulatory Burden on Property, Not "Expectations," and Expectations Play No Part When There Is a Physical Invasion

1. Takings Liability Is Dependent on the Burden on Property, Not a Property Owner's Knowledge

In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which postdates most of the precedent cited by the government entities, the United States Supreme Court clarified the nature and focus of constitutional takings protections. The Court described the three most common theories for a taking of private property: (1) a physical invasion or taking of property; (2) a denial of all economically beneficial use of property under *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992); and (3) a "partial" regulatory takings inquiry under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), which applies when a challenged restriction denies less than all use of property.

Despite the different elements of the foregoing theories, the *Lingle* Court emphasized that, at bottom, all the theories focus on the impact of the challenged governmental action on private property:

> Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in

> *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, *each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights*.

Lingle, 544 U.S. at 539.

Thus, a plaintiff's reasonable expectations are not a legitimate focus for takings analysis. The court's job is simply to consider whether the government's actions have caused a burden on property severe enough to warrant just compensation or other relief in all "fairness and justice." *Id.*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Supreme Court has identified a number of specific guideposts for carrying out this general task.

2. Most Takings Tests, Including the Physical Takings Test, Do Not Look to a Property Owner's "Expectations"

As noted above, there are three distinct frameworks for takings analysis. These are (1) physical takings rules applicable to a physical invasion or occupation of private property, (2) a regulatory takings tests based on a denial of all economic use of property, and (3) a multifactor approach designed for land use regulations that do not take all beneficial use of property.

Physical takings law is simple and strict. When regulation causes a physical taking, the government is categorically liable. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (When the government physically

takes "an interest in property for some public purpose, it has a categorical duty, under the Just Compensation Clause, to compensate the former owner."); *Sheffield Dev.*, 140 S.W.3d at 671.

Contrary to the State's argument, a physical taking does not require the government's "possession" of the subject property. A physical invasion is enough. *Id.* (With respect to a physical invasion, "[t]he direct, physical effect on property, *though short of government possession*, makes the regulation categorically a taking."). (emphasis added). A government-sanctioned physical occupation of private property by a third party is also a physical taking, even though title remains in the private hand. Physical taking rules also apply whenever a governmental decree requires a property to forego his own use of property so that a third party may use it. *Brown v. Legal Found. of Wash.*, 538 U.S. at 233-35.

A property owner's expectations have no impact on a physical invasion or occupation claim; it is a taking under all circumstances. *Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000) ("[T]he question is not why the owner acquired the property taken, but only did she own it at the time of the taking. Questions of whether the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis."). *Presault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (In the physical takings context, "[t]he

expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights."). Similarly, the purpose and size of a physical invasion are immaterial; it is a taking in all circumstances. *Id.*; *Palazzolo v. Rhode Island*, 533 U.S. at 617 (even a "minimal" occupation is a taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In short: because a physical occupation or invasion interferes with almost all the owner's private rights, it is a taking, period. *Loretto*, 458 U.S. at 434-35; *Nollan*, 483 U.S. at 833 n.2.

There is one more class of per se takings: those in which a regulation deprives a property owner of *all* economically beneficial use of private property. *Lucas*, 505 U.S. at 1015-18. Due to severity of such regulation, the owner's expectations, including the circumstances under which he acquired the property, are as irrelevant as they are in the physical takings context. *Palm Beach Isles*, 231 F.3d at 1363; *Sheffield Dev.*, 140 S.W.3d at 671; *Hallco Texas*, 221 77S.W.3d at 56 ("A regulation that deprives a property owner of all economically beneficial or productive use of the property 'makes the regulation categorically a taking.'" (quoting *Sheffield*, 140 S.W.3d at 671)).

Finally, reasonable expectations and other circumstances may play a part when a regulation only partly destroys the use of property (*i.e.*, when it leaves some uses available). *Penn Central*, 438 U.S. at 124. However, expectations are only one of many considerations, and hardly the most important criteria.

Palazzolo, 533 U.S. at 633-34 (O'Connor, J., concurring). To the contrary, as *Lingle* emphasized, "the *Penn Central* inquiry turns in large part, albeit not exclusively, *upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests*." *Lingle*, 544 U.S. at 540 (emphasis added). Thus, the state is wrong to assert that reasonable investment-backed expectations are dispositive. State's Brief on the Merits at 10; *see Lingle*, 544 U.S. at 540; *Palazzolo*, 533 U.S. at 632-34 (O'Connor, J., concurring); *Sheffield Dev.*, 140 S.W.3d at 672-73.

B. The Groundwater Denial Is Subject to Physical Takings Analysis Because It Does Not Just Restrict Water Uses, but Instead Eviscerates All Ownership Rights—To Capture, Possess, Use, and Sell

In light of the different standards in takings law, an important threshold issue is whether a physical takings or regulatory takings analysis applies here. As previously noted, the State believes that a regulatory takings inquiry controls. But this position fails to recognize that regulatory takings rules only address *limitations on property use* and do not reach a burden that cuts through other sticks in the Water Owners' bundle of rights. When a regulation goes beyond a use limitation, physical takings law typically applies. Here, the challenged water denial does not just restrain how the Water Owners can use their groundwater, it puts their water totally off limits and thus eviscerates all rights in that water right to capture, use, sell, possess, or exclude. Takings jurisprudence considers this to be a physical taking.

1. Regulatory Takings Rules Apply Only When a Restriction Merely Burdens a Certain Use; When It Destroys Additional Incidents of Ownership, Physical Takings Law Applies

The Supreme Court has emphasized that its regulatory takings jurisprudence (which this Court has adopted) is designed to address restrictions on the "use" of private property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322-23 (2002) (a "regulation . . . that bans *certain private uses* of a portion of an owner's property") (emphasis added); *id.* at 323 ("regulations prohibiting private uses"). More precisely, a regulation must be confined in its reach to the use of property, if the regulatory takings doctrine supplies the proper test. Thus, "a regulatory taking . . . does not give the government any right to use the property, *nor does it dispossess the owner* or affect her right to exclude others." *Id.* at 325 n.19 (emphasis added). In a regulatory takings situation, "[t]he property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State *merely prevents the owner from making a use* which interferes with paramount rights of the public." *Id.* at 326 n.22 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (dissenting opinion) (emphasis added)).

The same logic that limits regulatory takings doctrine to property use restrictions confirms that more extensive regulations warrant a physical takings

analysis. *Loretto*, 458 U.S. at 435-36. A regulation that destroys property owner rights beyond use warrants physical taking standards. *Id.*, *Tahoe-Sierra*, 535 U.S. at 325 n.19 ("Condemnation [a physical taking] of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.").

2. The Denial of the Owner's Ability To Withdraw Water Effectively Appropriates That Water and Eviscerates All the Owners' Rights, Warranting a Physical Takings Analysis

To determine whether regulatory or physical taking standards apply here, the Court must decide whether the water denial is simply a restriction on water "use," or whether it goes further, burdening additional property rights. In this case, the Water Owners applied for a permit to withdraw 700 acre feet from under their land, but were granted a permit for a mere 14 acre feet. *Edwards Aquifer Auth. v. Day*, 274 S.W.3d 742, 748 (Tex. Ct. App.-San Antonio 2008, rehearing overruled; review granted). The government does not deny that the Water Owners could physically capture and use all the desired amount of water, if permitted. It is the government's act of requiring the 686 acre feet of groundwater to remain in ground and unavailable that must be considered to see whether the burden on property is akin to a regulatory or physical takings.

In this case, the government's permit denial has put the restricted water entirely off-limits to the Water Owners. The Water Owners cannot capture the water, and for this reason, they cannot use it, and they cannot stop others from

using it. So burdened, the interest cannot be sold. *Contra Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927) (recognizing salability of interest in groundwater). Since they cannot withdraw their water, the Water Owners no longer have any tangible private rights in it at all. As such, the water denial has effectively dispossessed the Water Owners of their property interest. Thus, this is not a regulatory takings situation in which a real property owner is merely barred from using his land in a certain way. This is akin to a physical takings. *Brown*, 538 U.S. at 235.

Several older United States Supreme Court cases dealing with water disputes confirm that a physical taking occurs when the government prevents a person entitled to water from using it, even if the government itself does not physically capture it for its own use. *See Int'l Paper Co. v. United States*, 282 U.S. 399, 404-05 (1931) (finding that the government physically took water from a paper mill when it directed an agent to cut off the mill's water supply for a public purpose), *Dugan*, 372 U.S. at 614-16 (analyzing diversion of riparian owner's water supply as a physical taking).

The government cannot escape the conclusion that dispossessing the Water Owners of their groundwater is a physical taking by arguing that the Owners had no reasonable expectation of any other result. The Owners' expectations are immaterial. *Presault v. United States*, 100 F.3d at 1540 ("The Government's attempt to read the concept of 'reasonable expectations' as used

in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; *it is rejected categorically*.") (emphasis added).

Nor can the government avoid physical takings liability on the basis that the Water Owners can still use a (small) portion of their water. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [citation omitted] *regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.* *Brown*, 538 U.S. at 233 (emphasis added). The Supreme Court has specifically applied this principle in the water context. *See Dugan*, 372 U.S. at 623 ("Having plenary power to seize the whole of respondents' rights in carrying out the congressional mandate, the federal officers a fortiori had authority to seize less [water]. It follows that if any part of respondents' claimed water rights were invaded it amounted to an interference therewith and a taking thereof.").

The Authority has put off-limits groundwater which the Water Owners could otherwise capture; this states a claim for an unconstitutional physical taking of that part of their water right. *Id*. The Court should accordingly remand the Water Owners' takings claim for further proceedings.

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